

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN MICHAEL WAGNER,

Defendant-Appellant.

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UNPUBLISHED

June 19, 2007

No. 267646

Barry Circuit Court

LC No. 05-000140-FC

Before: Kelly, P.J. and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13). The trial court sentenced defendant to 15 to 25 years' imprisonment for his first-degree criminal sexual conduct conviction and 10 to 15 years' imprisonment for each second-degree criminal sexual conduct conviction. Defendant appeals as of right. We affirm.

Defendant contends that the testimony of a state trooper referring to defendant's post-arrest, post-*Miranda*<sup>1</sup> silence violated defendant's rights under the Fifth and Fourteenth Amendments. We disagree. Because there was no objection to this testimony, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Generally, a defendant's silence at the time of arrest and after receiving *Miranda* warnings is not admissible at trial. *People v Boyd*, 470 Mich 363, 374-375; 682 NW2d 459 (2004). However, under certain circumstances, inadvertent inquiry about a defendant's post-arrest, post-*Miranda* silence may not rise to the level of a constitutional violation. *People v Dennis*, 464 Mich 567, 582-583; 628 NW2d 502 (2001).

In this case, the state trooper referred obliquely to defendant's post-arrest, post-*Miranda* silence in response to a question by the prosecution and later in response to a question posed by

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

defense counsel on cross-examination. The following exchange occurred between the prosecution and the state trooper:

Q. Did he make a —a statement that you termed spontaneous?

A. Yes, he did.

Q. And what was that statement?

A. That our training, referring to police training is what I—is to get stuff out of people and that he didn't want to say anything incriminating.

On cross-examination, defense counsel immediately followed up, asking:

Q. Well did he—he—he was under arrest at the time?

A. He was under arrest, yes.

Q. Okay. And he decided to make statements to you?

A. He did talk with me briefly before requesting an attorney.

This is similar to what occurred in *Dennis*, in which the prosecutor asked the officer, “What type of investigation follow-up did you do with regard to this?” The officer answered that defendant “wished to speak to an attorney prior to me asking him any questions.” *Dennis, supra* at 570. In *Dennis*, our Supreme Court concluded that the prosecutor’s question was “aimed at eliciting testimony about these investigative efforts, not about the defendant’s refusal of a police interview.” *Id.* at 575. In concluding that there was no constitutional violation, the Court considered the following factors:

1) the limited nature of the improper testimony, 2) the lack of any effort by the prosecution to improperly use defendant’s invocation of the *Miranda* rights against him, 3) the strong curative instruction used by the trial court, and 4) that defendant did not testify so there is no concern of his post-*Miranda* silence having been used for impeachment purposes . . . . [*Id.* at 583.]

Here, the improper testimony was limited. The trial court provided a curative instruction regarding defendant’s out-of-court statements. And defendant did not testify, so the testimony was not used for impeachment purposes. While the prosecution commented during closing argument that defendant did not want to say anything incriminating to the trooper, the jury was instructed that arguments were not evidence to be considered in reaching a verdict. For these reasons, we conclude that the testimony elicited does not rise to the level of a constitutional violation, and there was no plain error.

Defendant also contends that defense counsel was ineffective for not objecting to the state trooper’s testimony. Because we have concluded that there was no plain error in the admission of this testimony, we also conclude that defense counsel was not constitutionally ineffective for failing to object to it. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Jane E. Markey  
/s/ Michael R. Smolenski